

QUESTIONS FOR THE RECORD

from Senator Charles E. Grassley to Professor Dean Rivkin

U.S. Senate Committee on the Judiciary

Hearing on “Improving Accountability and Oversight of Juvenile Justice Grants”

Submitted on April 28, 2015

1. OJJDP AUDIT OF TENNESSEE

- a. At the hearing, you testified that you attempted to inform OJJDP of compliance monitoring issues in Tennessee prior to the 2013 Audit. Who did you speak to at OJJDP and who refused to accept your data?**

On July 19, 2013, I spoke by phone with Gregory Thompson of OJJDP. In this conversation, he informed me of OJJDP’s planned Audit of Tennessee. I related to him that our Education Law Practicum had extensive experience representing status offenders in the Knox County Juvenile Court and informed him that we possessed nearly two years of Knox County Juvenile Detention Center data showing a significant number of incarcerations of children and youth in secure juvenile detention for status offenses such as truancy. I stated that this data appeared to conflict with the much lower number of incarcerations reported by the Tennessee Commission on Children and Youth (“TCCY”), the State monitoring agency. I offered to share this local data with him and the Auditors and to meet with the Auditors when they were in Tennessee to relate to them other JJDPA-related issues that our representation of status offenders revealed. I never heard back from him or from the Auditors.

In September, 2013, before the Tennessee Audit, my colleague in the Practicum, attorney Brenda McGee, also spoke by phone to Willie Bronson of OJJDP and related the same information to him that I had related to Gregory Thompson. Again, we heard nothing back from either Mr. Bronson or the Auditors. I recounted these experiences in my letter to Robert Listenbee dated November 13, 2013, which is part of the record of this Hearing.

- b. How did you obtain a copy of OJJDP’s 2013 Audit of Tennessee?**

In his February 28, 2014, response to my November 13, 2013, letter, Robert Listenbee stated that I could obtain a copy of the September, 2013, Tennessee Compliance Monitoring Audit by filing an FOIA request with OJJDP. I made this request by email on March 12, 2014, asking for the Audit and “underlying documents, data, and records that formed the basis of the Audit.” In early April,

2014, I received a redacted copy of the Tennessee Audit. To date, I have not received the underlying documents, data, and records that I requested.

c. What discrepancies or deficiencies did you observe in the 2013 Audit?

In our review the 2013 Tennessee Audit, we observed the following discrepancies and deficiencies. With due respect, the Audit is not as accurate or nearly as robust as it could have been had we been given the opportunity to share with OJJDP the local detention data that is referred to in answer to Question 1(a). above and the information that we gleaned from our cases about Tennessee's status offense system. The Audit contains deeply troubling findings about Tennessee's compliance system that, we believe, should have been uncovered and corrected in the last Audit of Tennessee in 2005, or well before. Several of these findings implicate long-standing deficiencies in Tennessee's DSO compliance monitoring system. Below are observations about the Audit:

1. In 2009, TCCY attributed 23 DSO violations to Knox County. This made Knox County the highest DSO violator in the State for the second year in a row (Knox County was also the highest in the State in 1999). The local juvenile detention data that we possessed for 2009 showed numerous – many more than 23 – secure detentions for truancy and other status offenses during that year.

In 2010 and 2011, TCCY found no DSO violations in Knox County. The data that we possessed showed significant numbers of post-adjudication incarcerations for status offenses. As far as we know, the Auditors did not look at this data. Based on information reported in the Audit, the Auditors only looked at four months of TCCY data from 2012. In two of the months that the Auditors did not review, there were two 14-day lock-ups for status offenses.

2. Had the Auditors consulted with us, we would have stressed to them that TCCY failed to take effective enforcement action against Knox County in the years when it showed numerous DSO violations. Instead, the Audit blandly noted that, under Tennessee law, TCCY did not have specific authority to sanction those facilities with repeated violations, and violation letters were not utilized (Audit, pp. 8-9). This lack of authority has existed in Tennessee for decades, yet OJJDP did not compel the State to correct this major deficiency until 2013.

3. Similarly, the Audit notes that Tennessee's Compliance Manual was out of date and not organized effectively to ensure accuracy in monitoring (Audit, p. 7). To our knowledge, OJJDP took no action before the 2013 Audit to compel Tennessee to produce a manual that would ensure the integrity of its data—the keystone to an effective monitoring system. Our information would have added important context to this deficiency.
4. The Audit finds that at least two regional monitors did not know that they were required to verify “all usages” of the VCO exception (Audit, p. 13), a glaring defect in the critical process of ensuring that those status offenders who are incarcerated pursuant to a VCO violation are accorded the “full due process” rights to which they are entitled under both federal and Tennessee law.

We would have been able to apprise the Auditors of at least one client of ours who was not appointed an attorney prior to his incarceration for an alleged violation of a VCO and our grounded belief that other status offenders were not appointed counsel in VCO violation hearings.

5. The Audit also finds: “OJJDP reviewed 2012 Compliance Monitoring Report where information indicated that the VCO was used 212 times” (Audit, p. 13). Inexplicably, the statistics compiled by the Tennessee Administrative Office of the Courts show 889 referrals for violation of a VCO in 2012. (2012 Annual Report of the Tennessee Council of Juvenile and Family Court Judges, p. 35).
6. The Audit acknowledges that Tennessee law “exceeds” JJDP requirements for incarcerating status offenders (Audit, p. 10). Had OJJDP consulted with us, we would have analyzed for them other provisions of Tennessee law that arguably prohibit any incarceration of status offenders. Nevertheless, the Audit proceeds to admonish the State that it should be careful about “over-reporting” JJDP DSO violations because federal law is more “lenient” than State law (Audit, p. 14).
7. The Audit also fails to confront the large number of lock-ups under OJJDP's so-called 24-hour exception. This exception, which finds no grounding in the absolute ban on secure detention in the JJDP, allows courts to confine status offenders – especially vulnerable runaways – for 24 hours before a court hearing and 24 hours after, excluding weekends and holidays. In Knox County alone, 237 non-DSO lock-ups were reported in 2012.

Had we had the opportunity to meet with the OJJDP Auditors, we would have demonstrated to them that Knox County is abusing the 24-hour exception (Juvenile Justice Amendments of 1977, Report of the Committee on the Judiciary United States Senate on S. 1021, May 14, 1977, pp. 60-61) (the 24 hour pre-adjudication exception should rarely be used) and that the exception itself has dubious legal origins. We would have made the case that the exception is arbitrary and capricious because it conflicts with the plain language and intent of the statute.